

### Remarks

Claims 1-4, 6, 10-21, 23-39, and 41-50 are pending. Claims 1, 21, 26, 29, and 39 have been amended while claims 5, 7-9, 22, and 40 have been cancelled. Applicants assert that all pending claims are in a condition for allowance. Applicants request reconsideration in view of the amendments and remarks below.

### Allowable subject matter

The Office Action indicated that claims 9, 20, 28 and 38 contained allowable subject matter but were objected to for being dependent upon a rejected base claim.

The subject matter of claim 9 is now incorporated into claim 1 and claim 7-9 is cancelled such that claims 1-4, 6, and 10 are in condition for allowance for at least these reasons.

### 102 Rejections

Claims 1, 3, 4, 6, 10, 29-31, 33-35, 45, 47, and 48 stand rejected under 35 USC 102(b) as being anticipated by Spier. Claims 39, 45-47, and 49 are rejected under 102(b) as being anticipated by DeCosta. Claims 39, 42, 43, 45-47 and 49 are rejected under 102(b) as being anticipated by Sarno. Claims 29, 41-50 are rejected under 102(b) as being anticipated by Sage. Applicants respectfully traverse these rejections to the extent they apply to the currently pending claims.

#### Claim 1

In relation to claim 1, this claim contains subject matter previously indicated to be allowable. Thus, the rejection may now be withdrawn to claims 1-4, 6, and 10.

#### Claim 29

In relation to claim 29, it is recited that the second sheet which contacts the fixture along its entire length and width comprises a non-skid, non-adhesive material that is a different material than the flexible material of the first fixture guard panel that contacts the fixture along its entire length and width. This language is supported by the specification in several places where the non-skid material is said to be a layer of rubber which is an example of a non-skid, non-adhesive material while the other flexible material is said to be a plastic. See, for example, page 6 lines 21-25.

Spier fails to disclose a sheet comprising such a non-skid, non-adhesive material that is different than the flexible material of the first fixture guard panel that contacts the fixture. Spier's disclosure shows that only the foam rubber layer 40 contacts the fixture 34. The plastic layer 32 is separate from the fixture 34 by the foam rubber layer 40 except where adhesive 42 holds layer 32 to the fixture 34. However, to the extent these small areas where adhesive 42 holds the layer 32 to the fixture can be considered as the layer 32 contacting the fixture, these small areas are contrary to the entire length and width of the panel being in contact with the fixture as recited in claim 29. Thus Spier fails to disclose the recitations that the non-skid non-adhesive material contacts the fixture along the entire length and width and the different flexible material also contacts the fixture along the entire length and width.

#### Claim 39

##### Rejections based on DeCosta

Claim 39 recites wherein the first sheet of the first fixture guard panel is a plastic and wherein the second sheet of the first fixture guard panel is a non-skid material other than plastic.

DeCosta discloses that all sheets of the panel 7 are plastic. Note that the laminated reflective fabric 2 is manufactured by a plastics company and is not disclosed as being any material besides plastic. Furthermore, the other fabric 9 is said to be nylon which is another plastic. Thus, DeCosta fails to disclose that a sheet of a panel is a non-skid material other than plastic such that claim 39 and dependent claims 41-44 are allowable over DeCosta.

##### Rejections based on Sarno

As noted above, claim 39 recites that the panel includes a non-skid sheet other than plastic. Sarno fails to disclose these recitations as they sheets 20, 22 of Sarno are both vinyl which are plastics. Thus, Sarno fails to disclose that a sheet of a panel is a non-skid material other than plastic such that claim 39 and dependent claims 41-44 are allowable over Sarno.

##### Rejections based on Sage

Sage also fails to disclose that a sheet of non-skid material is other than plastic. The panel 11 of Sage is plastic on both sides, top and bottom. FIG. 7 clearly shows that

the layer of plastic 16 provides both the top and bottom sheets of the panel 11. Thus Sage fails to disclose that a sheet of a panel is a non-skid material other than plastic such that claim 39 and dependent claims 41-44 are allowable over Sage.

#### Claim 45

##### Rejections based on Spier

In relation to claim 45, it is recited that a first fixture guard panel consists of a padding layer that is adjacent a first surface of the fixture. Applicants previously explain that due to the use of “consisting” in this element, the panel is entirely the pad. This language is supported in the specification such as at page 24, lines 1-5 referring to pads 702 and 708 of FIG. 7 which are examples of non-enclosed padding.

The Examiner has failed to apply the proper interpretation to claim 45 and the use of “consists of” language. As clearly stated in MPEP 2111.03, “The transitional phrase “consisting of” excludes any element, step, or ingredient not specified in the claim. *In re Gray*, 53 F.2d 520, 11 USPQ 255 (CCPA 1931).”

Thus, in order to reject this claim, the Examiner must set forth a reference where the panel is nothing more than the padding layer, as the “consists of” language, by definition, excludes any other element, step, or ingredient as stated in *In re Gray*.

Spier fails this test. Spier shows a plastic layer 32 and foam rubber layer 40. Thus, the panel of Spier has too many elements and cannot be anticipatory. Furthermore, because Spier is intended to be used with water in the tub and without the water contacting the foam rubber, there can be no modification to modify Spier to remove the plastic 32 because to do so would render Spier unfit for its intended purpose. Thus Spier fails to disclose all of the elements as recited in claim 44 such that claim 44 and dependent claims 45-50 are allowable over Spier.

##### Rejections based on DeCosta

Applicants repeat the discussion of claim 45 and note that DeCosta does not disclose any panel being entirely just the padding. Applicants further note that DeCosta requires that the panels have the reflective sheet in order to properly provide the tanning such that there can be no motivation to modify DeCosta to remove the outer sheets surrounding the padding because to do so would render DeCosta unfit for its intended

purpose. Thus DeCosta fails to disclose all of the elements as recited in claim 44 such that claim 44 and dependent claims 45-50 are allowable over DeCosta.

#### Rejections based on Sarno

Sarno also fails to disclose any panel being entirely just the padding. All of the panels of Sarno include a pad covered by vinyl 20, 22. Furthermore, because Sarno is intended to be used with water in the tub, there can be no modification to modify Sarno to remove the vinyl 20, 22 because to do so would render Sarno unfit for its intended purpose. Thus Sarno fails to disclose all of the elements as recited in claim 44 such that claim 44 and dependent claims 45-50 are allowable over Sarno.

#### Rejections based on Sage

As argued in the previous response, Sage fails to disclose that any panel is just the pad, as the panels of Sage include outer layers 16 to enclose any padding 15. Furthermore, because Sage is intended to be used with water in the tub, there can be no modification to modify Sage to remove the outer layers 16 because to do so would render Sage unfit for its intended purpose. Thus Sage fails to disclose all of the elements as recited in claim 44 such that claim 44 and dependent claims 45-50 are allowable over Sage.

#### 103 Rejections

There are many variations of obviousness rejections. Claims 7, 8, 36, 37 are rejected under 35 USC 103(a) as being unpatentable over Spier in view of Smith. Claims 29-31, 35, 41, 42, 48, and 50 are rejected under 103(a) as being unpatentable over Sarno in view of Spier. Claim 32 is rejected under 103(a) as being unpatentable over Sarno in view of Spier and further in view of Stevens. Claims 1-3, 6, 10, and 33 are rejected under 103(a) as being unpatentable over Sarno in view of Smith. Claims 4 and 34 are rejected under 103(a) as being unpatentable over Sarno in view of Smith and further in view of Spier. Claims 21 and 23 are rejected under 103(a) as being unpatentable over Sarno in view of Stevens. Claim 24 is rejected under 103(a) as being unpatentable over Sarno in view of Stevens and further in view of Spier. Claim 25 is rejected under 103(a) as being unpatentable over Sarno in view of Stevens and further in view of Smith. Claims 12, 3,

6, 10, and 33 are rejected under 103(a) as being unpatentable over Sage in view of Smith. Claims 4 and 34 are rejected under 103(a) as being unpatentable over Sage in view of Smith and further in view of Spier. Claims 7 and 8 are rejected under 103(a) as being unpatentable over Sage in view of Smith (3,563,837) and further in view of Smith (6,336,231). Claims 11-14, 17, 18, and 19 are rejected under 103(a) as being unpatentable over Sage in view of Smith. Claim 15 is rejected under 103(a) as being unpatentable over Sage in view of Smith and further in view of Smith. Claim 16 is rejected under 103(a) as being unpatentable over Sage in view of Smith and further in view of Smith (3,563,837). Claims 21 and 23 are rejected under 103(a) as being unpatentable over Sage in view of Stevens. Claim 24 is rejected under 103(a) as being unpatentable over Sage in view of Stevens and further in view of Spier. Claim 25 is rejected under 103(a) as being unpatentable over Sage in view of Smith and Spier and further in view of Smith (3,563,837). Claims 26 and 27 are rejected under 103(a) as being unpatentable over Sage in view of Stevens and further in view of Smith. Claims 29-31, 35 are rejected under 103(a) as being unpatentable over Sage in view of Spier. Claim 32 is rejected under 103(a) as being unpatentable over Sage in view of Spier and further in view of Stevens. Claims 36 and 37 are rejected under 103(a) as being unpatentable over Sage in view of Spier and further in view of Smith.

Applicants traverse each of these rejections to the extent they apply to the currently pending claims.

#### Claim 1

In relation to claim 1, this claim contains subject matter previously indicated to be allowable. Thus, the rejection may now be withdrawn to claims 1-4, 6, and 10.

#### Claim 11

Claim 11 recites a fixture guard panel that comprises... an opening through the first sheet, the padding layer, and the second sheet, and a flap with a first edge attached to the first sheet such that the flap covers the opening. The Office Action relies on the combination of Sage and Smith (6,336,231). However, there is no motivation to combine Sage and Smith because the purported combination would result in superfluous,

unintended, and unnecessary bathtub drain coverage.

Sage discloses a bathtub liner. The panel 11 has an uncovered opening 27 for the drain. The bathtub liner is intended to be used with water in the tub. The bathtub liner of Sage allows the water to fill in around it and then the regular drain on the top can be closed to hold the water and opened to release the water. Smith, on the other hand, discloses a bathtub liner also intended to be used with water in the tub and the liner is inflated and serves to hold the water within the inflated portion. Thus, Smith requires that the opening of the liner have the flap so that water is trapped within the liner because the inflated liner of Smith would float on the water and raise out of the tub if the water was able to get through the opening of the liner while the tub drain was closed.

Thus, one looking to modify Sage would have no motivation to do so because the opening of Sage allows the drain of the tub to function normally which works well with the liner of Sage because that liner is not intended to hold the water. Thus, to add the flap mechanism of Smith to the liner of Sage would not make sense because the problem that the flap solves in Smith is not present in Sage, namely, holding the water inside the liner of Smith. Therefore, because Sage does not suffer from the problem that the flap addresses in Smith, there can be no motivation to modify Sage. Thus, claim 11 is allowable over the purported combination for at least these reasons. Dependent claims 12-19 depend from an allowable base claim and are also allowable for at least the same reason.

#### Claim 21

##### Rejections based on Sarno in view of Stevens

Claim 21 recites a panel comprising ... an opening through the enclosure, and a flap with a first edge attached to the flexible sheet of material such that the flap covers the opening, the first edge being attached to the flexible sheet of material by a sewn hem. Neither Sarno nor Stevens discloses a flap. It should also be noted that the only reference that arguably discloses a flap over an opening is Smith (6,336,231) and including Smith fails to result in a valid rejection of claim 21 because Smith does not disclose that the flap is attached by a sewn hem and because there is no motivation to combine with Smith for purposes of including the flap because Sarno in view of Stevens does not suffer from the

problem that the flap in Smith is included to solve, namely, holding the water within the liner. Thus, claim 21 is allowable over Sarno in view of Smith for at least these reasons and dependent claims 23-28 depend from an allowable base claim and are also allowable for at least the same reasons

#### Rejections based on Sage in view of Stevens

Neither Sage nor Stevens discloses a flap. As previously discussed, Smith in the only reference that arguably discloses a flap over an opening and including Smith fails to result in a valid rejection of claim 21 because Smith does not disclose that the flap is attached by a sewn hem and because there is no motivation to combine with Smith for purposes of including the flap because Sage in view of Stevens does not suffer from the problem that the flap in Smith is included to solve, namely, holding the water within the liner. Thus, claim 21 is allowable over Sage in view of Smith for at least these reasons and dependent claims 23-28 depend from an allowable base claim and are also allowable for at least the same reasons

#### Claim 29

##### Rejections based on Sarno in view of Spier

Claim 29 recites that the second sheet which contacts the fixture along its entire length and width comprises a non-skid, non-adhesive material that is a different material than the flexible material of the first fixture guard panel that contacts the fixture along its entire length and width.

Neither Sarno nor Spier discloses a sheet comprising such a non-skid, non-adhesive material that is different than the flexible material of the first fixture guard panel that contacts the fixture. The Office Action concedes that Sarno fails to disclose the non-skid material but states that Spier accounts for this. However, Spier's disclosure shows that only the foam rubber layer 40 contacts the fixture 34. The plastic layer 32 is separate from the fixture 34 by the foam rubber layer 40 except where adhesive 42 holds layer 32 to the fixture 34. However, to the extent these small areas where adhesive 42 holds the layer 32 to the fixture can be considered as the layer 32 contacting the fixture, these small areas are contrary to the entire length and width of the panel being in contact with the fixture as recited in claim 29. Thus Spier fails to disclose the recitations that the non-skid

non-adhesive material contacts the fixture along the entire length and width and the different flexible material also contacts the fixture along the entire length and width. Thus, the combination of Sarno and Spier fails to disclose the recitations of claim 29. Therefore, claim 29 is allowable for at least these reasons, and dependent claims 30-38 depend from an allowable base claim and are also allowable for at least the same reasons.

#### Rejections based on Sage in view of Spier

Neither Sage nor Spier discloses a sheet comprising such a non-skid, non-adhesive material that is different than the flexible material of the first fixture guard panel that contacts the fixture. The Office Action concedes that Sage fails to disclose the non-skid material but states that Spier accounts for this. However, Spier's disclosure shows that only the foam rubber layer 40 contacts the fixture 34. The plastic layer 32 is separate from the fixture 34 by the foam rubber layer 40 except where adhesive 42 holds layer 32 to the fixture 34. However, to the extent these small areas where adhesive 42 holds the layer 32 to the fixture can be considered as the layer 32 contacting the fixture, these small areas are contrary to the entire length and width of the panel being in contact with the fixture as recited in claim 29. Thus Spier fails to disclose the recitations that the non-skid non-adhesive material contacts the fixture along the entire length and width and the different flexible material also contacts the fixture along the entire length and width. Thus, the combination of Sarno and Spier fails to disclose the recitations of claim 29. Therefore, claim 29 is allowable for at least these reasons, and dependent claims 30-38 depend from an allowable base claim and are also allowable for at least the same reasons.

#### Claims 39, 41-50

There is no rejection under 35 USC 103(a) of independent claims 39 and 45. As stated above in the 35 USC 102 section, claims 39 and 45 are allowable. Dependent claims 41-44 and 46-50 depend from allowable base claims and are also allowable for at least the same reasons, particularly since the cited references in the 103 rejections of claims 41-44 and 46-50 fail to address the deficiencies of the primary references used to reject claims 39 and 45.



Conclusion

Applicants assert that the application including claims 1-4, 6, 10-21, 23-39, and 41-50 is in condition for allowance. Applicants respectfully request reconsideration and further examination in view of the amendment and remarks above and further request that a Notice of Allowability be provided. Should the Examiner have any questions, please contact the undersigned.

No fees are believed due. However, please charge any additional fees or credit any overpayment to Deposit Account No. 50-3025.

Respectfully submitted,

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